

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Alsup, Judge

WAYMO LLC,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	<b>NO. C 17-00939 WHA</b>
	)	
UBER TECHNOLOGIES, INC.; OTTO	)	
TRUCKING LLC; and OTTOMOTTO	)	
LLC,	)	
	)	
Defendants.	)	
_____	)	

San Francisco, California  
Thursday, April 6, 2017

**TRANSCRIPT OF PROCEEDINGS**

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Thursday - April 6, 2017

9:31 a.m.

P R O C E E D I N G S

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**THE CLERK:** Calling Civil 17-939 WHA, Waymo LLC versus Uber Technologies, Inc., et al. It's on for motion hearing. Counsel, please state your appearances.

**MS. BAILY:** Your Honor, Melissa Baily and my colleagues Charlie Verhoeven and Jordan Jaffe for Waymo.

**THE COURT:** Thank you.

**MR. RAMSEY:** Good morning, Your Honor. Ismail Ramsey and my colleague Miles Ehrlich of Ramsey & Ehrlich on behalf of Anthony Levandowski.

**THE COURT:** Thank you.

**MR. GONZALEZ:** Good morning, Your Honor. Arturo Gonzalez for Morrison & Foerster on behalf of Uber.

**MS. DUNN:** And Karen Dunn from Boies, Schiller & Flexner on behalf of Uber.

**THE COURT:** All right. Thank you. Good morning to all of you.

Motion to intervene, what do you have to say on that motion?

**MR. RAMSEY:** Your Honor, just we'll submit it. We're asking for a permissive motion to intervene just with respect to this motion -- not this motion, I'm sorry -- the motion to modify.

1           **THE COURT:** All right. Let me ask. Is anyone going  
2 to be arguing that granting this motion would somehow improve  
3 chances for arbitration?

4                               (Pause in proceedings.)

5           **THE COURT:** Mr. Gonzalez, I want to know if this is  
6 going to be used to say that this improves the argument for  
7 arbitration.

8           **MR. GONZALEZ:** Your Honor, candidly, I hadn't given it  
9 any thought at all. That's not our intent.

10          **THE COURT:** All right. I'll take you at your word it  
11 is not your intent, so I'm going to allow the intervention, but  
12 solely for purposes of this motion and it has nothing to do  
13 with arbitration.

14          All right. Let's hear your motion.

15          **MR. RAMSEY:** Your Honor, you want me to begin?

16          **THE COURT:** I'm sorry?

17          **MR. RAMSEY:** You'd like me to begin?

18          **THE COURT:** What?

19          **MR. RAMSEY:** I just would ask --

20          **THE COURT:** Yes, please begin.

21          **MR. RAMSEY:** Okay. Your Honor, Anthony Levandowski  
22 has asserted his Fifth Amendment broadly. Waymo wants to get  
23 certain information from Anthony. They want to know to whom  
24 did he give materials in his possession to review for due  
25 diligence. The Fifth Amendment prevents this.

1        So what they can't get from Mr. Levandowski, Waymo is  
2 seeking to pry out from his lawyers. It's the equivalent of  
3 serving an interrogatory *To whom did you give the materials to*  
4 *for review?* Answering this question on a privilege log or  
5 through production of documents carries the implicit testimony  
6 of, one, *What were the files that you gave?* and, two, *Where are*  
7 *they and who may have them now?*

8        So what they can't get from Anthony, they're trying to get  
9 from his lawyers. This information, the tacit testimony that  
10 comes with any active production of documents is the heart of  
11 what the Supreme Court in *Hubbell* says the Fifth Amendment  
12 protects. It's the testimony about the existence of documents,  
13 the possession and location, and that these are the documents  
14 that are requested.

15        This is implicit testimony Mr. Levandowski gave to his  
16 lawyer, information about these documents, when he produced, to  
17 the extent that he did, any documents to his lawyer, and then  
18 those lawyers would share under a valid joint defense  
19 privilege.

20        *Gonzalez* teaches us that a common interest privilege is an  
21 extension of the attorney-client privilege. So the attorneys  
22 within that joint defense privilege stand in the shoes of the  
23 client with respect to asserting the Fifth Amendment privilege.  
24 The extension of that attorney-client privilege carries with it  
25 the duty of confidentiality. Not only is there the extension

1 of the attorney-client privilege, but the requirements of the  
2 Business and Professions Code and the legal ethics to not  
3 reveal client confidences.

4 We've shown here that this information, to the extent that  
5 it was, was provided in the context of this joint defense  
6 privilege. The privilege is valid.

7 As we submitted, there was a written joint defense  
8 agreement which explicitly set forth the purposes; and as we  
9 pointed out, it was prepared and entered into in  
10 contemplation -- and I'm quoting, Your Honor -- "in  
11 contemplation of potential investigations, litigation, and/or  
12 other proceedings relating to the proposed transactions."

13 **THE COURT:** What were those proceedings?

14 **MR. RAMSEY:** Well, it's the -- there were no active  
15 proceedings at that time, but they were the potential  
16 proceedings.

17 I would actually quote --

18 **THE COURT:** Well, what were they? What were the  
19 potential proceedings?

20 **MR. RAMSEY:** Well, there's various things. One of  
21 those could have been this very litigation. As I would quote  
22 the opening paragraph from Waymo's brief opposing our motion,  
23 it says (reading):

24 "That agreement," the joint defense agreement,  
25 "expressly contemplated potential litigation regarding the

1 yet-to-be-consummated acquisition; i.e., Uber, Otto.

2 Mr. Levandowski and their lawyers anticipated that there  
3 would be a legal proceeding just like this one."

4 **THE COURT:** So tell me, have I got this right, that  
5 way back before any of this litigation started and at the time  
6 this acquisition was being negotiated, your client and Uber  
7 were fearful that litigation like this would arise? True?

8 **MR. RAMSEY:** I would say, yes, fearful general  
9 litigation and the potential that litigation like this would  
10 arise.

11 **THE COURT:** But why? If it was a legitimate deal, why  
12 would they have anything to fear?

13 **MR. RAMSEY:** Well, there's a lot of aggressive  
14 litigation surrounding patents. There are employment issues,  
15 particularly when someone's going from one company to another  
16 and there are noncompete agreements. So there's a variety of  
17 various issues that arise when an employee moves from one  
18 company to another; and some of the issues that, quite frankly,  
19 were raised in the arbitration are ones that are potential.

20 **THE COURT:** But that came later, didn't it?

21 **MR. RAMSEY:** Not the issue, not the potential issue  
22 for it. I think here you've got the issue of an acquisition of  
23 an individual moving from one company to another, and the  
24 potential for litigation in various aspects are present,  
25 particularly where you have companies or employers who

1 aggressively assert a patent. Technology has come to fruition  
2 in this lawsuit. There's a variety of areas, and I think that  
3 that's the legal proceeding.

4 As the Ninth Circuit pointed out in *Gonzalez*, the  
5 proceeding doesn't have to be active or present; it can be  
6 anticipation of future proceedings. And that was the legal  
7 advice that was being sought. In that sense, the joint defense  
8 is valid, and the information that --

9 **THE COURT:** Where does the joint defense agreement  
10 reference privilege logs?

11 **MR. RAMSEY:** It doesn't.

12 **THE COURT:** It doesn't.

13 **MR. RAMSEY:** It doesn't reference privilege logs, but  
14 the issue here, Your Honor, is the testimony.

15 **THE COURT:** It does say that both sides will try to  
16 make a claim of privilege in response to a subpoena, that's  
17 true, but the way you make a claim of privilege is through a  
18 privilege log. So where in your agreement does it say that you  
19 won't do a privilege log?

20 **MR. RAMSEY:** Well, it doesn't say that in the  
21 agreement, Your Honor, but this is an unusual situation because  
22 that claim of privilege relates to attorney-client privilege  
23 and work product privilege, but what we're talking about here  
24 are the protections of the Fifth Amendment.

25 **THE COURT:** Where does your agreement refer to the



1 Fifth Amendment?

2 **MR. RAMSEY:** It doesn't, but the --

3 **THE COURT:** No.

4 **MR. RAMSEY:** It doesn't specifically but it doesn't  
5 change the fact that, as *Gonzalez* has pointed out, that the  
6 duty of confidence extends to confidentiality, extends to the  
7 other lawyers within that joint defense agreement, and that  
8 they stand in the shoes of the client.

9 And Mr. Levandowski retains his Fifth Amendment privilege,  
10 and that's what's at the heart of this issue, Your Honor, and  
11 that is that there is implicit testimony that Mr. Levandowski  
12 has given to his lawyers. And I don't think there's any  
13 question that --

14 **THE COURT:** What is that testimony?

15 **MR. RAMSEY:** Well, like I pointed out initially,  
16 Your Honor, it's the implicit idea of, one, *What were the files*  
17 *that you gave?* and, two, *Where are they and who may have them*  
18 *now?*

19 And there's no question that -- and I don't think there's  
20 any debate or opposition to the notion that Waymo could not  
21 serve interrogatories on Mr. Levandowski at this time and ask  
22 those questions and he not have the ability to assert his  
23 Fifth Amendment privilege. So --

24 **THE COURT:** Possibly that's true, but no one's trying  
25 to get that information right now. We're trying to just get a

1 privilege log.

2           **MR. RAMSEY:** But I think what *Hubbell* teaches us is  
3 that there are sometimes implicit testimony that is given, both  
4 in the production of documents -- and I would also point the  
5 Court to the *Chin* case that we referenced, where the  
6 requirements of a privilege log were suspended because the  
7 information that's being conveyed and the implicit testimony is  
8 such that it implicates the Fifth Amendment.

9           So ordinarily if we were just talking about the  
10 attorney-client privilege or a work product doctrine assertion,  
11 we wouldn't have this issue because the actual information that  
12 was conveyed in the privilege log would not be such that it  
13 would provide a link in the chain for potentially building a  
14 criminal case.

15           But this is the very point of why Waymo wants this  
16 information, so that they can get a link in the chain to start  
17 down the path -- to get the beginning point of a lead that can  
18 start them down the path towards understanding where those  
19 documents are. And that's what the Fifth Amendment prevents,  
20 and that's the point of *Hubbell*, and that's the implicit  
21 testimony that Mr. Levandowski has provided to his counsel in  
22 the context of this joint defense privilege.

23           And when the requirements for that privilege log, which  
24 really should be the minimal necessary, but when they encroach  
25 upon the Fifth Amendment, I mean, I think that that

1 Fifth Amendment protection trumps.

2 And here there, you know, is information that we can give,  
3 in any event, to test the validity of the joint defense  
4 privilege, and the name, for example, of the third-party  
5 vendors are not necessary to do that. To the extent that the  
6 Court feels that it is, we think that that information should  
7 be properly provided in camera and the Court could observe  
8 that.

9 But to give that information to Waymo is to require  
10 Mr. Levandowski indirectly through his lawyers to answer the  
11 very questions that I just raised, and that is testimony. It  
12 may be tacit testimony, it may be implicit testimony, but it's  
13 still testimony. And Waymo should not be allowed to use the  
14 power of this Court to pry that information out of  
15 Mr. Levandowski either directly or indirectly through his  
16 lawyers.

17 **THE COURT:** All right. Let me hear from the other  
18 side.

19 **MS. BAILY:** Good morning, Your Honor.

20 **THE COURT:** Remind me your name.

21 **MS. BAILY:** Melissa Baily.

22 **THE COURT:** Baily?

23 **MS. BAILY:** Baily.

24 **THE COURT:** Thank you. Go ahead.

25 **MS. BAILY:** So we just heard that Mr. Levandowski is

1 asserting his Fifth Amendment very broadly, and that's going to  
2 have severe and significant consequences on this case; but,  
3 frankly, it's not really relevant to why we're here today  
4 because what we're here to talk about today is not Waymo trying  
5 to pry certain information from Mr. Levandowski or from his  
6 lawyers; what we're here to talk about today is Your Honor's  
7 order that defendants, Uber and Otto, provide certain documents  
8 and certain information. Uber and Otto do not have  
9 Fifth Amendment rights. They're corporations.

10 Mr. Levandowski, through your order and what we're talking  
11 about today, has not been asked to testify about anything. And  
12 the Fifth Amendment privilege is a personal privilege.

13 Mr. Levandowski can assert it all he wants when he's asked to  
14 testify, but he cannot ask others to assert it for him. That  
15 is contrary to Supreme Court precedent.

16 So there is no Fifth Amendment that we're here to discuss  
17 today with respect to Your Honor's order related to Uber and  
18 Otto.

19 Now, if Uber and Otto want to assert that there's a common  
20 interest privilege with respect to Mr. Levandowski stealing  
21 documents, then they can do that in a privilege log, but they  
22 need to do it in a lot of detail; and I believe Your Honor  
23 covered that to some degree yesterday. And there is no reason  
24 that they should not be forced to provide the name of a  
25 third-party author of a document over which they are seeking

1 the privilege.

2 **THE COURT:** Well, could I ask this? It's very unclear  
3 to me whether we're talking about one document or many  
4 documents.

5 **MS. BAILY:** It's unclear to me, Your Honor.

6 **THE COURT:** Just stay right there.

7 **MS. BAILY:** Okay.

8 **THE COURT:** Mr. Gonzalez, how many documents are at  
9 issue -- in play on the privilege log that --

10 **MR. RAMSEY:** Your Honor, I'm sorry. I would like to  
11 object. I mean, this goes --

12 **THE COURT:** What's the objection?

13 **MR. RAMSEY:** That this would violate the  
14 Fifth Amendment privilege.

15 **THE COURT:** Overruled.

16 **MR. RAMSEY:** Well, can I just -- for the record,  
17 Your Honor, could I just --

18 **THE COURT:** You've made your record.

19 **MR. RAMSEY:** Thank you.

20 **THE COURT:** Mr. Gonzalez, so how many documents are we  
21 talking about? You led me to believe it was just one, the due  
22 diligence report; but on reflection, I'm not sure you actually  
23 said that. How many documents are in play?

24 **MR. GONZALEZ:** So, Your Honor, it depends on what the  
25 question is. I mean, we've been talking about this due

1 diligence report for, it seems, many multiple days.

2 **THE COURT:** I'll make it very clear to you, and I  
3 don't want any evasion. I gave a direct order on March 13th or  
4 16th to produce documents, and I said what they were, what you  
5 had to produce. Now, you know what you had to produce. You  
6 want to claim privilege at least as to one, but is it more than  
7 one?

8 **MR. GONZALEZ:** There is a report. There are,  
9 Your Honor, many, many e-mails that talk about the general  
10 issue of the report and related issues.

11 **THE COURT:** How many of those would you be putting on  
12 the privilege log if you were to claim privilege? That's what  
13 I want to know.

14 **MR. GONZALEZ:** So we're being overinclusive,  
15 Your Honor. Right now the log, we're just about finished with  
16 it, is about 300 pages.

17 **THE COURT:** That would be --

18 **MR. GONZALEZ:** It's thousands of e-mails.

19 **THE COURT:** --under this privilege thing based --  
20 that relate to this problem; is that what you're saying?

21 **MR. GONZALEZ:** Yes.

22 **THE COURT:** You've got 300 items that are hanging fire  
23 waiting on the order that I'm going to make on this motion?

24 **MR. GONZALEZ:** To be clear, I believe the log at this  
25 point is 300 pages, which it's hundreds -- basically,

1 Your Honor, it's hundreds of e-mails, possibly thousands. I  
2 know that we were reviewing at least 7,000 e-mails, Your Honor,  
3 and we've got a log --

4 **THE COURT:** All right. So there's more than just one  
5 due diligence report?

6 **MR. GONZALEZ:** If you're asking me broadly about the  
7 privileges that are at issue, the answer is yes.

8 **THE COURT:** All right. I appreciate the  
9 clarification. Thank you. Please have a seat.

10 **MR. GONZALEZ:** You're welcome.

11 **THE COURT:** All right. Go ahead.

12 **MS. BAILY:** Well, Your Honor, with respect to all of  
13 those documents, even if we were asking that Mr. Levandowski  
14 provide information about those documents, the Fifth Amendment  
15 doesn't even apply.

16 We already know that the documents exist. The public  
17 knows. The government knows. We already know that the  
18 documents relate to the 14,000 documents that  
19 Mr. Levandowski --

20 **THE COURT:** But he hasn't admitted himself, I don't --  
21 maybe -- I don't know if he has; I don't think he has -- he  
22 hasn't admitted himself that he has possession of 14,000  
23 documents or that he took the 14,000 documents that you allege.

24 Now, you made a pretty good record that he did, but that's  
25 your side of the story. If we actually heard his side of the

1 story, he might say something different.

2 So I guess counsel's point is that it would be admitting  
3 to trade secret theft in violation of Title 18 of the United  
4 States Code possibly if he admitted to it, or maybe state law  
5 violations, a very serious proposition; therefore, he wants to  
6 invoke the Fifth Amendment.

7 **MS. BAILY:** Your Honor, we're not asking for his  
8 testimony right now. We're asking for the production of  
9 documents or the production of a privilege log. And what I'm  
10 saying is, even if we were asking Mr. Levandowski for the  
11 documents, we know that there's a due diligence report that  
12 exists and we know where it is.

13 **THE COURT:** Well, where is it? I don't know where it  
14 is.

15 **MS. BAILY:** Well, we know Uber has it. They're going  
16 to put it on a log.

17 **THE COURT:** Well, that's a fair point.

18 **MS. BAILY:** And if we know that it exists and we know  
19 where it is, then there is no Fifth Amendment right with  
20 respect to production. So even if we were asking  
21 Mr. Levandowski for it, he would have to provide a log. We  
22 already know about the documents and we already know where they  
23 are. It's beside the point.

24 It's Uber. Uber doesn't have a Fifth Amendment right,  
25 and --



1           **THE COURT:** What do you say -- that's true. That's  
2 true, but what do you say to the joint defense agreement  
3 argument that that extends not the privilege, not the -- that  
4 the attorney-client privilege would cover the information in  
5 that report?

6           **MS. BAILY:** Right. So if what you're asking me,  
7 Your Honor, is setting aside the Fifth Amendment, because it  
8 has no role here, what about the common interest privilege,  
9 then I would say with respect to the common interest privilege,  
10 currently Uber's position is that there is no common interest  
11 with respect to the 14,000 documents.

12           If they're going to assert that before they even acquired  
13 Otto that there was some common interest with respect to the  
14 stolen documents, then we need enough information to evaluate  
15 exactly what the common legal interest was, how these documents  
16 furthered that common interest agreement, and whether the  
17 documents were privileged to begin with, whether they were  
18 disclosed to third parties.

19           We're talking a lot about keeping secret the identity of a  
20 third party who had access to what is now the privilege is  
21 being claimed over. Well, that would usually be a waiver of  
22 the attorney-client privilege. So the idea that Uber is going  
23 to be able to hide that from us so that we can't test these  
24 privileges, I just don't know of any authority for it,  
25 especially when the Fifth Amendment doesn't come into play at

1 all.

2 **THE COURT:** Is there -- I'm going to ask Mr. Ramsey to  
3 answer this question too.

4 Is there any decision in the history of the universe that  
5 says you don't have to provide a privilege log in circumstances  
6 like ours?

7 **MS. BAILY:** I am not aware of one. My understanding  
8 is that this would be an unprecedented decision that explicitly  
9 contradicts settled Supreme Court law.

10 **THE COURT:** All right. Mr. Ramsey, what's the answer  
11 to that one question, please.

12 **MR. RAMSEY:** Your Honor, I think that there are two  
13 that are analogous or are best cases.

14 **THE COURT:** That say privilege log, please. Now,  
15 don't give me general platitudes. I want to know is there  
16 anything that takes your principles that you're relying on to  
17 the point to say you don't even have to put it on a privilege  
18 log?

19 **MR. RAMSEY:** Yes, Your Honor.

20 **THE COURT:** Okay. That's great to hear. Tell me what  
21 they are.

22 **MR. RAMSEY:** *SEC versus Chin*, which is a  
23 District Court of Colorado case that we cited. It's 2012 U.S.  
24 District Lexis 182252.

25 **THE COURT:** Okay. What was the fact pattern in that

1 case?

2           **MR. RAMSEY:** It's similar -- the difference I would  
3 point out to the Court is it's not a joint defense case. It's  
4 one directly in which a privilege log was requested from the  
5 counsel themselves. So there was a request for -- I'm sorry --  
6 privilege -- one second. I'm just trying to pull directly up.

7           But there was a request for a privilege log where the  
8 assertion of sort of various categories of documents would  
9 provide information about the -- information -- it says  
10 (reading):

11                 "Compliance with the subpoena would require the  
12 respondents to provide information apparently not known to  
13 the government and which may be incriminating."

14           And then it went on to talk about that being in the  
15 context of a privilege log and specifically suspended that  
16 requirement.

17           It says (reading):

18                 "Consequently, under the unique circumstances of this  
19 case and given the nature of the requests contained in the  
20 subpoenas, requiring Ronald and Misty Touchard to provide  
21 a detailed privilege log of the documents claimed to be  
22 subject to the protections of the Fifth Amendment is  
23 testimonial, could be incriminating, and falls within the  
24 protection of being self-incrimination."

25           **THE COURT:** Hold that thought. We're going to come

1 back to it. I'm going to ask Ms. Baily to comment on *SEC*  
2 *versus Chin*.

3 What's your -- you said you had another decision. What's  
4 that?

5 **MR. RAMSEY:** That's *In Re Syncor ERISA Litigation*.  
6 That's a Central District of California case. It's 229 F.R.D.  
7 636, 649.

8 **THE COURT:** And what was the fact pattern there?

9 **MR. RAMSEY:** Your Honor, I'm sorry. I'm blanking  
10 right at this moment, but if you give me just a moment, I can  
11 get the --

12 **THE COURT:** All right. I'll come back to that.

13 Ms. Baily, what do you say about *SEC v. Chin*?

14 **MS. BAILY:** Well, I have the same thing to say about  
15 both cases. I have two things to say about them. The first is  
16 that in both of those cases it was the person who was asserting  
17 the personal right not to incriminate himself who was objecting  
18 to the production of the log, so --

19 **THE COURT:** No, no. Mr. Ramsey said it was the  
20 attorney.

21 **MS. BAILY:** My understanding is that whether it was --  
22 my understanding is that it was the, for example, the defendant  
23 who was asserting his personal privilege not to provide  
24 information in a log.

25 **THE COURT:** Well, who was the subpoena directed to?

1           **MS. BAILY:** I believe it was the defendant. I could  
2 be wrong. I would like to look again.

3           **MR. RAMSEY:** I believe that -- I'm sorry. I didn't  
4 mean to interrupt.

5           I believe she's correct. I didn't mean to suggest that it  
6 wasn't --

7           **THE COURT:** Well, then, how can that help you? I  
8 mean, I see that that's a good point if the subpoena was  
9 directed directly at Mr. Levandowski, but that's not our fact  
10 pattern.

11          **MR. RAMSEY:** But here what this is doing is -- and I'm  
12 prying out information -- well, let me point to a couple cases,  
13 and that's *Fisher* makes clear that attorneys when it comes to  
14 the Fifth Amendment stand in the shoes of their client. So  
15 prosecutors have to --

16          **THE COURT:** No, they didn't really say that. What it  
17 said was the client has the Fifth Amendment privilege but the  
18 lawyer is bound by the attorney-client privilege. It does not  
19 say that the lawyer stands in the shoes of the client and  
20 asserts the Fifth Amendment.

21          **MR. RAMSEY:** I think what it says is with respect to  
22 information that's covered by the Fifth, just because it's in  
23 the hands of the lawyer does not create an independent source.  
24 So a prosecutor cannot circumvent a client's Fifth Amendment  
25 protection simply because the information is in the hands of

1     their lawyer. To, you know, take that to its logical  
2     conclusion in the criminal setting, it would --

3             **THE COURT:** *Fisher*, I read it, does it even mention a  
4     privilege log?

5             **MR. RAMSEY:** *Fisher* does not mention a privilege log.

6             **THE COURT:** No, it doesn't.

7             **MR. RAMSEY:** But --

8             **THE COURT:** It says the documents themselves, but how  
9     are we ever going to test the existence of the privilege  
10    without a privilege log?

11            **MR. RAMSEY:** Well, I think here the question is  
12    whether there's an existence of a valid common interest  
13    privilege, and that's established through the face of the  
14    common interest agreement, and that's the privilege that we're  
15    talking about.

16            Because once that's established, to the extent that  
17    Mr. Levandowski has the right to assert the Fifth Amendment  
18    privilege over the information, he gets to do that through his  
19    lawyers. His lawyers are not situated differently to establish  
20    an independent source. That source of asking that information  
21    from his lawyers is the equivalent of asking that information  
22    from him, and that's what we have here.

23            **THE COURT:** You know that if we were to adopt your  
24    view, then it looks like thousands of documents would be  
25    relegated to secrecy with no way for us to -- or at least no

1 way for Waymo to challenge the claim of privilege.

2 **MR. RAMSEY:** No. I actually --

3 **THE COURT:** Almost anything could be swept under the  
4 rug.

5 **MR. RAMSEY:** No, I don't think that's correct,  
6 Your Honor.

7 **THE COURT:** Why isn't that correct?

8 **MR. RAMSEY:** Because we are asserting his  
9 Fifth Amendment privilege, and this is the distinction between  
10 the Fifth Amendment privilege and the attorney-client  
11 privilege. We are asserting his Fifth Amendment privilege with  
12 respect to 42 documents. And so --

13 **THE COURT:** Forty-two? That's the first time I've  
14 heard that. Where did you say that?

15 **MR. RAMSEY:** I did not put it in our brief. We talked  
16 about the log that was being prepared; and in terms of the log  
17 entries that relate to the due diligence report, my  
18 understanding is that's 42 documents and we've reviewed those.

19 **THE COURT:** Listen, I have been pulling my hair out  
20 trying to figure out what's at stake in this motion.

21 **MR. RAMSEY:** Forty-two documents, Your Honor.

22 **THE COURT:** Forty-two documents.

23 **MR. RAMSEY:** Forty-two line entries.

24 **THE COURT:** How come Mr. Gonzalez told me there were  
25 thousands?

1           **MR. RAMSEY:** I think there was some confusion in the  
2 way the question was phrased. The question was: How many  
3 privileges will Uber assert? Now, Uber has its own  
4 attorney-client and work product privileges that it plans to  
5 assert with respect to documents, but that's separate and apart  
6 from the Fifth Amendment invocations.

7           **THE COURT:** How am I supposed to know what these 42  
8 documents are?

9           **MR. RAMSEY:** Well, there is some basic information  
10 that can allow you to test the Fifth -- for example, that it's  
11 a due diligence report -- but we'd invite the Court to --

12           **THE COURT:** Who did the due diligence report?

13           **MR. RAMSEY:** Well, that, Your Honor, is what we're  
14 fighting about because disclosing that information provides a  
15 link in the chain, and it's not a question about whether the  
16 information itself is somehow inculpatory. The question is  
17 whether the information could provide a prosecutor a starting  
18 point, a link in the chain, a lead. And that's what we're  
19 talking about.

20           They want this information because if they know who  
21 provided that -- who prepared that report, who is the author,  
22 that would tend to reveal the location. It would start to  
23 establish the link in the chain for those documents, and that  
24 is exactly what we're --

25           **THE COURT:** What's so wrong about that?



1           **MR. RAMSEY:** *Hubbell* says that that's --

2           **THE COURT:** It would be the third party doing all the  
3     testifying. Mr. Levandowski wouldn't have to inculcate  
4     himself.

5           **MR. RAMSEY:** No, it would be --

6           **THE COURT:** It would be somebody else that would say,  
7     "Hey, he brought 14,000 documents over here. We reviewed them.  
8     We told him they were all trade secrets."

9           **MR. RAMSEY:** It would be --

10          **THE COURT:** Something like that, that's what they're  
11     trying to get it for, and that would be a very legitimate use  
12     of the process.

13          **MR. RAMSEY:** It would not be legitimate, Your Honor.  
14     They're trying to build their case. It would be a third party  
15     who's been employed in the context of the joint defense  
16     agreement, and that is -- and who received the information  
17     about those documents. The implicit testimony --

18          **THE COURT:** I want to give you a hypothetical because  
19     you are hiding from me what the real facts are, and you want me  
20     to be in the dark. This is not a criticism of Ms. Baily  
21     because she's trying to shed light on these circumstances, but  
22     you're asking me to rule on something that is amorphous and in  
23     the dark. So I want -- I'm going to give you a hypothetical  
24     that I thought of. I'm not saying it's true. I'm saying it  
25     could be true and I don't know, and Waymo has got a right to

1 find out if this is true or not, in my humble opinion.

2 So let's say somebody steals trade secrets from their  
3 employer, not necessarily Mr. Levandowski, they go out and they  
4 go to a competitor and they say, "Let's form a competing  
5 company."

6 And the competitor says, "By the way, can you take with  
7 you some of the documents? It would be good to give us a head  
8 start."

9 So let's just say for purposes of my hypothetical that  
10 both sides have a lot of guilty knowledge, and they say, "How  
11 can we deal with this?" No problem, joint defense agreement.

12 Then one side says, "Well, listen, maybe we can get an  
13 opinion from somebody that these are not really trade secrets.  
14 Maybe that will help us protect us if we ever get sued. So  
15 let's give them to a third party, get a due diligence report.  
16 We'll get them to tell us that it's not a trade secret."

17 So they turn it over to a law firm, third-party law firm,  
18 who gives them that opinion, or maybe they turn it over to an  
19 economist firm who tells them what it's worth so they can set  
20 the price for the transaction.

21 Now, that entire transaction, which is hypothetical and  
22 not necessarily anything close to what's going on in our case,  
23 though it is comprehended by what you're telling me, is within  
24 the ambit of what you're telling me, and there would be  
25 thoroughly guilty people on both sides, thoroughly guilty

1 people on both sides who want to cloak everything and even the  
2 assertion of privilege they want to get away with not having to  
3 list it on a privilege log. You want to bless that kind of  
4 transaction, don't you?

5 **MR. RAMSEY:** When there's a legitimate legal purpose,  
6 which there was here in performing the due diligence.

7 **THE COURT:** I just have your word for it. I don't  
8 know that it was legitimate. Where did you get that idea?

9 **MR. RAMSEY:** Well, there's a reasonable basis for  
10 that.

11 **THE COURT:** No, there's not. There's nothing in the  
12 record that shows me that it was reasonable.

13 **MR. RAMSEY:** I also think that the Fifth Amendment  
14 protection is supposed to be interpreted broadly, and waivers  
15 of the Fifth Amendment are disfavored. And so I think in this  
16 situation there is a reasonable basis to believe that that  
17 information was shared for a legitimate legal purpose.

18 **THE COURT:** No, it's not. There is no such basis to  
19 infer that.

20 **MR. RAMSEY:** It's what's on the face of the joint  
21 defense agreement, which Waymo in their brief specifically said  
22 that there was an anticipation of various types of litigation  
23 such as this that they were preparing a defense, if necessary,  
24 to. And that's a legitimate purpose. That's not a business  
25 purpose. That's a legal purpose. And when there is a legal

1 purpose, a joint defense is valid.

2 **THE COURT:** In 42 years in practice and this job, I  
3 have seen joint defense agreements used as a cloak for  
4 wrongdoing. I have also seen them used for legitimate  
5 purposes. I don't know which one applies here. I just can't  
6 take your word because they wrote it the right way and used the  
7 right magic recitals that they have a legitimate purpose here.

8 **MR. RAMSEY:** And I would ask the Court to view this in  
9 camera and --

10 **THE COURT:** Well, give it to me right now and I'll  
11 review it while I'm on the bench. Give me the 42 documents  
12 that you want to be withheld. I'll do it right now.

13 **MR. RAMSEY:** I do not have the 42 documents.

14 **THE COURT:** See, that's just a bluff.

15 **MR. RAMSEY:** No, that's not a bluff, Your Honor.

16 **THE COURT:** It's a bluff.

17 **MR. RAMSEY:** It's not a bluff.

18 **THE COURT:** I'm going to make a ruling very quickly  
19 and you're not prepared. I will read them right now. Give  
20 them to me.

21 **MR. RAMSEY:** I would ask Your Honor to move slowly  
22 here. This is a constitutional protection and, quite frankly,  
23 it's -- like I said, waivers are disfavored and it's the sort  
24 of protection that could create problems down the line. A  
25 *Kastigar* hearing ultimately is what would be needed to the

1 extent that this information is compelled.

2 It is a difficult row to hoe for, you know, various sides  
3 down the line, but I would ask the Court to move slowly. And I  
4 don't have the 42 documents with me. They were not in our  
5 possession, and so I, you know, couldn't have those; but I  
6 would ask --

7 **THE COURT:** So you're making this offer that I review  
8 it in camera but you don't even have it in your possession, so  
9 you're not in a position to deliver on it, are you?

10 **MR. RAMSEY:** I am in a position to deliver on it  
11 because --

12 **THE COURT:** No, no. It's a delay tactic.

13 **MR. RAMSEY:** No, Your Honor.

14 **THE COURT:** Mr. Ramsey, I will do it if you give them  
15 to me. With their permission, I would review them today.

16 **MR. RAMSEY:** May I have just a moment, Your Honor?

17 **THE COURT:** Yeah. I want to make one other thing  
18 clear before you confer.

19 **MR. RAMSEY:** I'm sorry, Your Honor?

20 **THE COURT:** I want to make it clear that if I review  
21 them, I may decide that they need to see them in order to  
22 assist me in determining whether or not there should be a  
23 privilege asserted. I'm not giving you any guarantee that I  
24 would never take the next step of saying I need more  
25 information.

1           So I am not going to buy into the idea that I would make a  
2       decision solely on what you on an *ex parte* basis gave me, but I  
3       am willing, I am willing to at least look at *ex parte* to see  
4       what you want me to look at and then make a decision whether to  
5       require you to disclose more so that they would have a fair  
6       opportunity to make their case.

7           So if you want to give them to me with that caveat, I  
8       will -- and today, they have to be today because you should  
9       have come with them in your hand today if you wanted me -- I  
10      knew that was a bluff, but go ahead. You confer.

11                               (Pause in proceedings.)

12           **MR. GONZALEZ:** Your Honor?

13           **THE COURT:** Yes.

14           **MR. GONZALEZ:** So I thought we were here today to  
15      argue about whether or not we have to provide a privilege log.  
16      We have a privilege log, and we don't have any objection to the  
17      Court viewing --

18           **THE COURT:** You're not the one making the motion.  
19      Look, we are here -- that was one of the reasons we're here,  
20      but Mr. Ramsey trying to make some record that I refused to  
21      look at the things in camera threw that out there.

22           I know how this works. I didn't -- I've been around, and  
23      then he would go up on appeal on an emergency motion saying I  
24      refused even to do that, and now you're trying to divert me off  
25      that.

1           **MR. GONZALEZ:** No, Your Honor.

2           **THE COURT:** Too bad. Just have a seat.

3           Mr. Ramsey, what is your answer?

4           **MR. RAMSEY:** I would suggest, Your Honor, you look at  
5 the privilege log unredacted in camera and with our suggested  
6 redactions.

7           **THE COURT:** No, I'm not going to do that. That  
8 will -- that won't help me much. How would that possibly help  
9 me?

10          **MR. RAMSEY:** Well, it actually will show you the  
11 information that we think should be redacted because it  
12 establishes the implicit testimony, which is really what's at  
13 issue here. It's the information in the privilege log that is  
14 being disclosed.

15          And so to the extent that we can show you the information  
16 that we think should be redacted, because our motion is to  
17 suspend the requirements of the privilege log, that is our  
18 request, and that would allow you to see the information that  
19 we are -- the actual information that we're asking to be  
20 suspended and will allow you to evaluate whether there's  
21 implicit testimony that's included with that, and at the same  
22 time it would still preserve Uber's rights to make later claims  
23 about other privileges.

24          But this goes to the core of what we're asking, and it's  
25 the information that the Court needs to evaluate. This is the

1 specific --

2           **THE COURT:** Would that be accompanied by a declaration  
3 from someone like Mr. Levandowski who could show that it would  
4 be incriminating in some way, or would I just have to take your  
5 word for it again?

6           **MR. RAMSEY:** You don't have to take my word,  
7 Your Honor. The Supreme Court in *Hubbell* has said that the  
8 location of documents -- and this is what they're trying to get  
9 at, it's the location, it's the possession of documents. The  
10 Supreme Court in *Hubbell* and *Fisher* said that that implicit  
11 testimony is what could establish a link in the chain.

12           And so when they're trying to find out that information  
13 about location, they don't know the location, Your Honor, that  
14 is what they are trying to find out. That is what they just  
15 said to this Court, was that they didn't know where the  
16 documents were.

17           So that's what we're talking about, information that would  
18 provide a link in the chain, and that's what *Hoffman* says, the  
19 information itself does not have to be inculpatory.

20           **THE COURT:** I'm going to come back to your in camera  
21 proposal, and I want to get Ms. Baily's view on that too.

22           But let me get your view on that first before I go on. I  
23 have some more questions for you.

24           **MS. BAILY:** Your Honor, well, especially with respect  
25 to this sort of staged, *Oh, look at the privilege log; Oh, then*



1    *maybe look at the documents*, I mean, this is clearly a shell  
2    game that is created for delay.

3            We have to move quickly. Mr. Levandowski is still at Uber  
4    and still seemingly has our documents, and so the notion that  
5    we are going to take -- you know, even my friend's original  
6    motion said, "Oh, we're going to make serial motions about  
7    these Fifth Amendment issues." Well, you know, serial motions  
8    are not going to work here while Mr. Levandowski is still  
9    running Uber's self-driving car program and still has my most  
10   confidential material.

11           And I hate to come back to the basics here, but we today  
12   are not talking about Mr. Levandowski offering any testimony at  
13   all. We are talking about a privilege log about documents. We  
14   know where the documents are. They're at Uber. Uber is  
15   putting them on a log. If they want to establish a common  
16   interest privilege and an attorney-client privilege, then they  
17   have to do what is required to do that, and they have to  
18   identify third parties who have had access to the documents.

19           We're not asking Mr. Levandowski to do it. Uber has to do  
20   it. Mr. Levandowski can't say to everyone else in the world,  
21   "Don't offer evidence that's incriminating to me." It is his  
22   personal privilege. It's just the theory that we're all sort  
23   of assuming is correct here just doesn't hold water under  
24   Supreme Court precedent.

25           **THE COURT:** All right. You said that earlier, so I

1 have that point in mind.

2 Did the author of the due diligence report sign the joint  
3 defense agreement or sign some other agreement?

4 **MR. RAMSEY:** One moment, Your Honor.

5 **THE COURT:** I'd like to understand that.

6 (Pause in proceedings.)

7 **MR. RAMSEY:** Yes, Your Honor, there is a signed  
8 letter.

9 **THE COURT:** To the joint -- no, no, no. Answer my  
10 question. Did they sign on to the joint defense agreement?

11 (Pause in proceedings.)

12 **MR. RAMSEY:** Yes, Your Honor. There's a signed letter  
13 that indicates that the documents were being provided under the  
14 joint defense agreement for review under the joint defense  
15 agreement.

16 **THE COURT:** All right. Now, the copy of the joint  
17 defense agreement you gave me does not show any third party  
18 signing on to it. So what you gave me is actually concealing  
19 something from me, isn't it?

20 **MR. RAMSEY:** Not intentionally, Your Honor.

21 **THE COURT:** How many other people signed letters like  
22 that?

23 **MR. RAMSEY:** I believe that is -- I believe that's the  
24 only one, Your Honor.

25 **THE COURT:** You believe or you know? Anytime a lawyer

1 says they believe, there's a high risk it's not true. They  
2 just don't know.

3 **MR. RAMSEY:** Well, it's not --

4 **THE COURT:** They're guessing.

5 **MR. RAMSEY:** But, Your Honor, it's not a high risk, or  
6 at least I'm not trying to intentionally deceive the Court.

7 **THE COURT:** I know you're not, but as a lawyer, you've  
8 got to tell me whether you know or not.

9 **MR. RAMSEY:** I don't know for absolute.

10 **THE COURT:** So you don't know. All right.  
11 Was this a law firm, this third party? Was it a law firm?

12 **MR. RAMSEY:** It's not a law firm, Your Honor.

13 (Pause in proceedings.)

14 **THE COURT:** Did this third party provide any of that  
15 information to somebody else?

16 **MR. RAMSEY:** Not outside of the joint defense  
17 privilege.

18 **THE COURT:** Is there a sworn declaration that says  
19 that somewhere, or do I just take your word for it?

20 **MR. RAMSEY:** We could submit -- there's not a  
21 declaration that we have, but we can submit a declaration that  
22 it was only disclosed for that limited purpose and that there  
23 is written protocol that says that it is only being --

24 **THE COURT:** You see how problematic this is?

25 **MR. RAMSEY:** -- released for that information.

1           **THE COURT:** Ordinarily if there's a claim of  
2 privilege, we look to see every single person who got the  
3 information because there could easily be a waiver. It happens  
4 all the time.

5           You want me to assume everything went right. It could  
6 have gone haywire. There could be any number of ways in which  
7 even if your theory works, it was waived; and very likely maybe  
8 your theory doesn't even work under the joint defense  
9 agreement.

10          But the whole purpose of a privilege log is to test the  
11 claim of privilege, and you want me to just take your word as  
12 an honorable person -- honorable lawyer who's appeared in front  
13 of me many times and for whom I have great respect, you want me  
14 to -- you want to ride on that and me to just take your word  
15 for it in an important case like this. I can't do that. I  
16 just can't do it. It's got to be a sworn record.

17           **MR. RAMSEY:** Your Honor, the redacted log that we'd  
18 like you to view *ex parte* in camera --

19           **THE COURT:** Have you given the redacted version to  
20 them?

21           **MR. RAMSEY:** No, Your Honor. That's what --

22           **THE COURT:** You won't even give them the redacted  
23 version? That's the version you want me to let them see;  
24 right? And yet you haven't even given it to them for comment.

25           **MR. RAMSEY:** That's a fair point. We can give the

1 redacted version. We were waiting to get some guidance from I  
2 think --

3 **THE COURT:** No, no, no, no. You're waiting to do --  
4 anytime a lawyer says they want guidance from the judge,  
5 they're waiting to see what they've got to tell the judge in  
6 order to get to -- in other words, they want me to make a  
7 ruling and then they'll give me whatever it is that I want.

8 No. You make your record -- you make your record and it's  
9 either good enough or it's not good enough.

10 **MR. RAMSEY:** We can provide them a redacted copy,  
11 Your Honor.

12 **THE COURT:** Mr. Gonzalez, I want you to come up here  
13 for a minute.

14 Now I'm confused. You told me there were thousands of  
15 documents that you were going to claim privilege on, but now  
16 Mr. Ramsey says there's only 42. So are you trying to do some  
17 kind of riding on the coattails of this to conceal information  
18 from the other side? What's going on here?

19 **MR. GONZALEZ:** Not whatsoever, Your Honor. The 42  
20 number that you heard is the report plus exhibits to the  
21 report. My bigger number includes e-mail communications back  
22 and forth during the due diligence process, and that's why it's  
23 a substantially larger number. There's no intent to hide  
24 anything. We're preparing a very lengthy log that will have a  
25 substantial amount of detail.

1           **MS. BAILY:** Your Honor, I'm not sure why we didn't get  
2 any nonredacted entries in the log.

3           **THE COURT:** You should have. Of course, you should  
4 have. If they were going to make this argument, you should  
5 have had it before the hearing.

6                           (Pause in proceedings.)

7           **THE COURT:** Ms. Baily, I cut you off several times.  
8 You go ahead and say what else you would like to say.

9           **MS. BAILY:** Well, Your Honor, I do just -- going back  
10 to the two District Court cases, because I do just want to  
11 finish the record on that, and I know it does go back to  
12 something that you've told me you understand, but my  
13 understanding of those two cases is, A, that it was the  
14 personal privilege that was being asserted with respect to the  
15 person -- the person who is asserting the Fifth Amendment  
16 privilege, in order to avoid providing the log, was the  
17 equivalent of Mr. Levandowski in this situation. We don't have  
18 that here.

19           The other thing I would just say is in both of those  
20 cases, there was a question as to whether the existence and  
21 location of the documents would otherwise be known without the  
22 log. We don't have that here. We know where the documents are  
23 and we know that they exist. Uber has them. So those are the  
24 cases.

25           So just coming back to Your Honor's original question, it

1 would still be unprecedented for Uber to be able to assert  
2 Mr. Levandowski's Fifth Amendment privilege in order to avoid  
3 providing information on a privilege log.

4 With respect to the information on a privilege log, we  
5 need that information for exactly the reasons Your Honor  
6 already commented on, so I'll be brief, but there's no reason  
7 why we should not be able to depose this third party to  
8 understand whether there has been a waiver. And even to take a  
9 declaration's word for it I think would be unfair here.

10 And the last thing I'd like to say is, we really can't  
11 move slowly here. I mean, moving slowly is what has been  
12 happening. You know, sometimes I feel like -- again, like it's  
13 a shell game because, you know, yesterday -- you know, we heard  
14 about a due diligence report yesterday, we heard about a  
15 400-page -- 200- to 400-page privilege log, today we heard that  
16 only 42 entries are at issue but then we didn't get the rest of  
17 the entries. And, you know, we're on a fast schedule that we  
18 need because Mr. Levandowski is still at Uber and we still have  
19 not received our documents back.

20 So, Your Honor, unless you have other questions.

21 **THE COURT:** I understand that. Okay. And I'm  
22 sympathetic to that point, but yesterday I heard Mr. Gonzalez  
23 say that you've known since October about the 14,000 documents.

24 **MS. BAILY:** Your Honor, so my friend should re-review  
25 the preliminary injunction motion where we set out explicitly

1 the timeline of when the investigation started, also when we  
2 found out that the defendants had our documents, and when we  
3 found out that the defendants' technology looks like our own.  
4 That is all set out explicitly in the preliminary injunction  
5 motion.

6 **THE COURT:** Okay. Mr. Gonzalez, I have a -- I'm  
7 still -- see, I don't want to get myself into a mess where I --  
8 and here's the mess: That Mr. Ramsey is going to hand up to me  
9 now maybe two documents, one redacted, one unredacted, that  
10 only refers to 42 documents. And then if you give me another  
11 one that doesn't track what he's giving me, then it's going to  
12 be confusing what I'm ruling because you're the one that's  
13 supposed to be asserting the privilege. In other words, you're  
14 the one that's supposed to be giving me the privilege log, not  
15 Mr. Ramsey. No one is subpoenaing his client. So how am I  
16 going -- have you seen his document --

17 **MR. GONZALEZ:** Yes.

18 **THE COURT:** -- he's pointing to?

19 **MR. GONZALEZ:** I'm familiar with the log, Your Honor.

20 **THE COURT:** With his version of the 42?

21 **MR. GONZALEZ:** Your Honor --

22 **THE COURT:** How am I going to tie that into your  
23 thousands of pages then?

24 **MR. GONZALEZ:** Transparency, I prepared that log. We  
25 prepared that log, so I'm familiar with it. The log that I'm



1 talking about is a separate log so that there is no confusion.  
2 That log --

3 **THE COURT:** How can you have one that has thousands of  
4 entries and yet they say that they're only claiming privilege  
5 over 42?

6 **MR. GONZALEZ:** Your Honor, I can't -- I can't tell you  
7 why they're picking the 42, but what I can tell you is that the  
8 42 are exhibits to the report, and that's probably where their  
9 focus is. My list is a very broad list.

10 **THE COURT:** All right. Here's what we're going to do,  
11 unless I hear an objection. Ms. Baily, I'm going to let you  
12 object before I actually do it.

13 I'm going to sit right here and I'm going to let  
14 Mr. Ramsey hand up to me two documents, the redacted version  
15 and the unredacted version that refer to the 42, and he's got  
16 to give you right now the unredacted version.

17 And you, Mr. Gonzalez, have got to give me the privilege  
18 log that you want to use so that I can see -- because you're  
19 the one at the end of the day that's got to file the privilege  
20 log, not Mr. Ramsey.

21 **MR. GONZALEZ:** Understood, Your Honor.

22 **THE COURT:** I'll sit right here. What do you --

23 **MS. BAILY:** You said that I was going to get the  
24 unredacted version.

25 **THE COURT:** You're going to get for now the unredacted

1 version.

2 **MS. BAILY:** So we're all going to look at --

3 **THE COURT:** I might at the end of the day rule that  
4 you get everything --

5 **MS. BAILY:** Okay.

6 **THE COURT:** -- but I don't want Mr. Ramsey to argue on  
7 appeal that I spurned his offer.

8 **MR. GONZALEZ:** Your Honor, did you mean redacted, that  
9 they'll get the redacted version?

10 **THE COURT:** Exactly. That's what I meant, redacted.

11 **MS. BAILY:** That's why I was asking.

12 **THE COURT:** I misspoke. I misspoke. I'm sorry. I  
13 meant you get the redacted version for now.

14 All right. So let's sit right here. We're going to do  
15 some homework.

16 Do you have any objection to that, Ms. Baily?

17 (Pause in proceedings.)

18 **THE COURT:** Mr. Gonzalez, do you have any objection?

19 **MR. GONZALEZ:** I don't have any objection to your  
20 seeing those logs, Your Honor. The only thing I want to be  
21 careful about, and this is very important, is we're not here  
22 today -- I haven't had a chance to even brief joint interest,  
23 so we're here today to talk about this log and whether there's  
24 a Fifth Amendment concern.

25 **THE COURT:** Listen, if you lose -- if this is lost,

1 I'm going to get out an order that very quickly you're going to  
2 produce a privilege log. If you had something to tag along to  
3 this, you should have done it promptly. Too bad.

4 **MR. GONZALEZ:** Your Honor, I'm fine with that. I'm  
5 fine with producing the log. I just want to make clear that  
6 they keep talking about moving quickly, and we will produce the  
7 log, Your Honor. That's not an issue. I'm only pointing out  
8 that there's been a lot of discussion here about joint interest  
9 privilege, which we haven't even had a chance to brief.

10 **THE COURT:** Yeah, you did. There was a motion. You  
11 could have put in a brief.

12 **MR. GONZALEZ:** But the motion, Your Honor, is whether  
13 or not we have to produce a log that discloses the name of the  
14 consultant. That's the issue before the Court, and I just want  
15 to make it clear that that's --

16 **THE COURT:** I think -- no, no, no. It was a much  
17 broader motion than that. That's not what -- that was not the  
18 only item on the table, so I'm not buying in to what you're  
19 saying.

20 If you don't want to turn over your records, you don't  
21 have to. I'm asking -- I just do not want to be spurning an  
22 opportunity to try to help Mr. Ramsey, who is going to argue on  
23 appeal that I refused to look at his version.

24 **MR. GONZALEZ:** Your Honor, we have no objection.

25 **THE COURT:** I'm going to look at it right now.

1           **MR. GONZALEZ:** We have no objection.

2           **THE COURT:** All right.

3           **MS. BAILY:** Your Honor, I'm just going to state two  
4 objections only for the record. One is we object to not seeing  
5 the unredacted log; and, two, I just have to state for the  
6 record the objection that this procedure assumes that somehow  
7 the Fifth Amendment could somehow apply to something that Uber  
8 is providing. And, as you know --

9           **THE COURT:** I understand.

10          **MS. BAILY:** You understand that.

11          **THE COURT:** I'm not ruling against that. I tend to  
12 agree with you, but since this is an amorphous motion, I'm  
13 trying my best to get my arms around it --

14          **MS. BAILY:** I understand.

15          **THE COURT:** -- and I want to see the materials.

16 All right.

17          **MR. RAMSEY:** Your Honor, what I have is I have an  
18 unredacted log with highlights of what we propose to be  
19 redacted. I do not --

20          **THE COURT:** So you don't have what you told me you  
21 had?

22          **MR. RAMSEY:** I didn't tell you I have a redacted  
23 version. What I have --

24          **THE COURT:** Do you have something you can give to  
25 Ms. Baily right now?

1           **MR. RAMSEY:** No, Your Honor.

2           **THE COURT:** All right. Then your offer is rejected.

3           **MR. RAMSEY:** But, Your Honor, momentarily I could sit  
4 through and line through one. We just have to black it out.

5           What I was prepared was to give the Court the log with the  
6 highlights of our proposed redactions, and so I have no  
7 objection to getting to her forthwith, immediately sitting and  
8 doing it right away, a redacted version of this log. But what  
9 I have for the Court at this moment is a copy of the log with  
10 highlights that show our proposed redactions.

11           **THE COURT:** All right. What we're going to do is --  
12 do you have another copy of that thing?

13           **MR. RAMSEY:** We do have a clean copy.

14           **MR. GONZALEZ:** I have a clean one, Your Honor.

15           **THE COURT:** All right. Then you will stay right here  
16 after the hearing is over, Ms. Baily will stay, you will go  
17 through and you will do the redactions that conform exactly to  
18 what you give me, and then -- and do not change it in any way.  
19 It's got to be exact, and then -- except that it will be  
20 blacked out so that she can't see the things. Then you give  
21 me -- then you leave with my deputy clerk the one copy, and I  
22 will work with that one copy.

23           **MR. RAMSEY:** Yes, Your Honor.

24           **THE COURT:** All right.

25           **MR. RAMSEY:** Thank you.

1           **THE COURT:** So you have to stay a little later till  
2 you get your version.

3           **MS. BAILY:** That's fine, Your Honor.

4           Can we have the other massive log that was due on Friday  
5 that doesn't have any redactions?

6           **THE COURT:** Just one second. Have you turned over any  
7 log at all?

8           **MR. GONZALEZ:** No, we haven't, Your Honor. The  
9 massive log was not due on Friday. Your order says to produce  
10 it promptly, and the order -- the log that was ready on Friday  
11 is the one that's being objected to; and I told them yesterday  
12 we're working on the lengthier one, which requires a review of  
13 thousands of e-mails, and we're probably 80 percent done with  
14 that.

15           **THE COURT:** How does the longer -- I still do not  
16 understand how the longer privilege log that has thousands of  
17 entries ties into the 42 that Mr. Ramsey wants me to look at.

18           **MR. GONZALEZ:** I believe this is the answer,  
19 Your Honor: The only tie-in is that the objection that's been  
20 made is that they don't want the disclosure of the consultant  
21 to be made; and so the only thing that I would have to redact  
22 from my very long log is the name of that consultant if  
23 Your Honor concludes that we should not be disclosing that.

24           **THE COURT:** I believe you are grossly misinformed  
25 about the purpose of today's hearing. That's not what I

1 understood this was about. So I hope the Court of Appeals  
2 judges will read this record to see the obfuscation that the  
3 poor judge has been subjected to on this motion.

4 You tell me it's only about one -- the name of one  
5 provider due diligence, and Mr. Ramsey is arguing this in an  
6 extremely broad -- much broader context, all of which is  
7 impossible for us to -- the other side in fairness to be able  
8 to respond to because they don't even have the privilege log,  
9 which is the traditional way to assert a privilege.

10 Mr. Ramsey, do you want to -- I'm going to --  
11 nevertheless, I'm going to let you do what I said I would do.  
12 I want you to know there is a substantial risk that I'm going  
13 to order all of it to be produced promptly, and you better be  
14 ready to make an emergency motion to the Court of Appeals  
15 because I'm not going to stay this very long, maybe 24 hours.

16 So they're going to be producing a privilege log  
17 probably -- I'm talking to Uber now -- soon; and so if you  
18 want -- if I rule against you, you better be ready to go to the  
19 Court of Appeals on an emergency motion.

20 **MR. RAMSEY:** Yes, Your Honor, we would be requesting a  
21 stay if you decide that.

22 **THE COURT:** I won't stay it long. I will stay it just  
23 long enough for you to present an emergency motion to the Court  
24 of Appeals --

25 **MR. RAMSEY:** Yes, Your Honor.

1           **THE COURT:** -- if I rule against you.

2           All right. Are we done for today?

3           **MR. RAMSEY:** Your Honor, there's only one other issue.  
4           You mentioned whether there had been any distribution of the  
5           report outside the joint defense. Your Honor, we could submit  
6           a brief declaration today that there was no authorization from  
7           Mr. Levandowski to distribute this information outside of the  
8           common interest privilege.

9           **THE COURT:** Listen, see, once again you're fishing for  
10          what it is. You have made a record. The record is what it is.  
11          If you want to try to beef up the record and file more, I would  
12          consider possibly allowing you to do that, although it would be  
13          unfair because now it's a rolling motion where you're making it  
14          up as you go along.

15          So I don't know whether I would allow that or not, but  
16          it's up to you. If you want to decide to go down that path and  
17          try to supplement your record, I will consider whether or not  
18          that should be allowed.

19          **MR. RAMSEY:** Thank you, Your Honor.

20          And I would just also point to paragraph 4 of the  
21          declaration that was submitted indicating that it was  
22          prepared -- a third party prepared a due diligence report that  
23          may have referenced documents reviewed pursuant to the common  
24          interest privilege.

25          So with that, Your Honor, I'm prepared to start redacting.



1           **THE COURT:** Ms. Bailly, are we done now?

2           **MR. VERHOEVEN:** Your Honor, this is Mr. Verhoeven. I  
3 apologize for not being here yesterday.

4           **THE COURT:** That's okay.

5           **MR. VERHOEVEN:** But I did read the transcript, and  
6 Your Honor had said that with respect to their statement, the  
7 defendant's statement or Uber's statement, that they had a good  
8 story to tell and how does that --

9           **THE COURT:** I'm glad you reminded me.

10          Mr. Gonzalez, you did tell me that. You did tell me that  
11 he has a good story to tell, but now you're saying that he  
12 won't tell it. How did you get -- how do you square those two  
13 things?

14          **MR. GONZALEZ:** All right, Your Honor, it's publicly  
15 available. He went to college at Berkeley. He --

16          **THE COURT:** That's all you were talking about?

17          **MR. GONZALEZ:** No, Your Honor. I just started. I  
18 just started.

19          **THE COURT:** He went to Berkeley? That's a good story?

20          **MR. GONZALEZ:** No. The good story is this, and it is  
21 a good story: He went to Berkeley, studied there also for a  
22 master's. Created a motorcycle, Your Honor, that drove itself.  
23 It was the only motorcycle in a national competition of  
24 autonomous vehicles. And you know where that motorcycle is  
25 today, Your Honor? In the Smithsonian.

1       After that he set up two separate companies on autonomous  
2 vehicles, and he did all of that before he ever set foot on  
3 Google grounds, before he ever set foot there.

4       This is not someone, in my view, since you asked me to  
5 give you my opinion, this is not someone who has to steal  
6 anything. He knows this stuff.

7           **THE COURT:** Well, then why did he take the 14,000  
8 documents?

9           **MR. GONZALEZ:** Your Honor, that, I don't have an  
10 answer to, but I do think he's got a very good story to tell.

11          **THE COURT:** That's the story that the jury is going to  
12 want to know about.

13          **MR. GONZALEZ:** Well, Your Honor, if I have my way,  
14 he'll testify but I can't compel him.

15          **MR. VERHOEVEN:** Your Honor, with respect to the order,  
16 I think it was the March 16th order that compelled production  
17 of documents on the 31st of March, we've been told by counsel  
18 for Uber that they don't have any ability to review  
19 Mr. Levandowski's files.

20       We know that they're a signatory -- counsel for Uber was a  
21 signatory for the joint defense agreement -- or the common  
22 interest agreement they're talking about. They now say they  
23 have hundreds of items related to that on their logs, but they  
24 say they don't have any control to produce any of that.

25       They produced a signed employment agreement for

1 Mr. Levandowski last Friday when they submitted a brand new  
2 demand for arbitration. Notably Mr. Levandowski wasn't even a  
3 signatory to it.

4 The notion they don't have control of these documents and  
5 that's the reason they haven't even reviewed them is not  
6 credible, Your Honor. And Your Honor's order said that they  
7 were to produce not just the 14,000 documents, but documents of  
8 subsequent use of the information in those documents.

9 Now, Your Honor, what they're doing interpreting your  
10 order -- and I want to make this perfectly clear -- is they're  
11 not looking for the information in those 14,000 documents and  
12 whether they've been used. All they're doing is they're asking  
13 us for file names and they're running searches for exact file  
14 names. They asked us for hashtags. They're running searches  
15 of just attached hashtags.

16 **THE COURT:** You weren't here for the hearing when I  
17 dealt with it the best I could yesterday. Your side is getting  
18 15 more search terms and they're going to run those search  
19 terms. I'm not going to go back and re -- you make good  
20 points, but I'm not going to go back and let you reargue. You  
21 weren't here. Your other side did a great job arguing, but  
22 it's too late. No.

23 **MR. VERHOEVEN:** The only point I want to make is we've  
24 made those documents available for inspection. We've made our  
25 trade secret list available confidentially to the other side.

1 They need to review those in order to comply with Your Honor's  
2 order to determine whether or not the information is used by  
3 them, and they have not done that.

4 Thank you, Your Honor.

5 **THE COURT:** Look, you can -- you made your point, and  
6 I'm not rejecting that latter point, but I'm not going to go  
7 back and revisit what happened yesterday.

8 **MR. VERHOEVEN:** Thank you, Your Honor.

9 **THE COURT:** All right. Mr. Ramsey, do you have  
10 something to say?

11 **MR. RAMSEY:** Yes, Your Honor. Just with respect to a  
12 stay, we would ask that if you do decide to rule against us,  
13 that the order be that Uber be required to turn over the  
14 privilege log with all the information except what we have  
15 proposed be redacted. And if you decide that that additional  
16 proposed redaction should be turned over, we'd ask that just  
17 with respect to those redactions, that that order be stayed.

18 **THE COURT:** Just a minute. I thought you were going  
19 to turn over the redacted version to Ms. Baily --

20 **MR. RAMSEY:** We are.

21 **THE COURT:** -- in a few minutes.

22 **MR. RAMSEY:** We are, Your Honor.

23 **THE COURT:** So what are you --

24 **MR. RAMSEY:** My point is to the redactions themselves.  
25 So just where I could say with respect to the unredacted

1 version, we would ask for -- we ask the Court just to have that  
2 limited order, which could be hopefully stayed longer than the  
3 24 hours that the Court indicated.

4 **THE COURT:** Why? Why can't you do a brief? Why can't  
5 you get your emergency motion ready now?

6 **MR. RAMSEY:** Well, we can try, but I'm concerned that  
7 24 hours may not be enough.

8 **THE COURT:** Well, I'll consider what you say, but the  
9 other side makes a good point; and that is, this is a  
10 fast-moving industry and I've already delayed the hearing till  
11 May 3rd. And come May 3rd, I don't want someone to be saying  
12 that *There are unresolved issues. They haven't had a chance to*  
13 *look at materials. They're still producing documents.*

14 So this is not -- earlier you were saying, yes, go slow,  
15 go slow, Fifth Amendment. Okay. Fair point.

16 On the other side of the ledger, though, is they have made  
17 a record. Right now the record available to the Court under  
18 oath is pretty convincing that Mr. Levandowski downloaded  
19 14,000 documents, wiped his computer clean, transferred those  
20 documents to a thumb drive, and took the thumb drive with him  
21 when he went to start a new company. That's the record  
22 undenied.

23 So it's possible that tomorrow whenever the Uber  
24 opposition comes in, we will see that that's completely false,  
25 but right now it's not and that record warrants some

1 expedition. So I have to balance that in there too.

2 **MR. RAMSEY:** And I understand that, Your Honor, and I  
3 would just note that we are moving and have been moving  
4 quickly. We made our --

5 **THE COURT:** Yes, you did.

6 **MR. RAMSEY:** -- appearance in this case last week on  
7 Thursday. I think the next day, Friday, we were issued an  
8 order to turn around a brief over the weekend and then by  
9 Tuesday at noon. Just so the Court knows, you know, both my  
10 law partner and I had vacations scheduled. We worked straight  
11 through our vacations to turn around that brief by noon on  
12 Tuesday.

13 We then had the response yesterday at 4:00 o'clock. My  
14 law partner canceled the end part of his vacation, came back.  
15 We are here today. We were here yesterday.

16 So we are trying everything we can, and I know the Court's  
17 familiar with the size of our firm. We are not the size of  
18 Morrison & Foerster or Quinn Emmanuel, but --

19 **THE COURT:** You're both excellent lawyers, so that  
20 makes up for a lot of things.

21 **MR. RAMSEY:** So we have been moving --

22 **THE COURT:** So just get cracking is all I have to say.

23 **MR. RAMSEY:** Well, I would just ask the Court's  
24 consideration. We do have some other significant cases that  
25 we're working on as well.

1           **THE COURT:** I'll keep that in mind. I will consider  
2 that, your point.

3           **MR. RAMSEY:** Thank you, Your Honor.

4           **THE COURT:** All right. So you need to stay behind  
5 long enough to do the redacted version and to give that to  
6 Ms. Baily. And then I'm going -- I've got an 11:00 o'clock  
7 hearing. I've got to be out here at 11:00 o'clock, but I will  
8 look at the version that you leave behind with the highlighting  
9 that you want to have redacted before I'll make a decision.  
10 All right?

11           **MR. RAMSEY:** Thank you, Your Honor.

12           **THE COURT:** All right. Thank you.

13           **MR. GONZALEZ:** Your Honor, just one very quick thing.

14           **THE COURT:** Yes.

15           **MR. GONZALEZ:** Yesterday you had mentioned John Cooper  
16 as a potential special master. I just wanted you to know that  
17 I've conferred with my clients, and even though his firm  
18 actually represents Google, we would be fine with that.

19           **THE COURT:** Well, what does the other side say?

20           **MR. VERHOEVEN:** Your Honor, we need a little bit more  
21 time to get back to you. I just got back to town at 11:30 last  
22 night.

23           **THE COURT:** All right. Would you do that? I am  
24 not -- I don't have the specific assignment yet for Mr. Cooper;  
25 however, somebody like him who's got some technical abilities

1 and a superb lawyer I believe will in due course be of great  
2 value in this case, and I don't want there to be a snafu when  
3 the time comes, *Oh, it will take us two more weeks.* So,  
4 please, by tomorrow could you let me know?

5 **MR. VERHOEVEN:** Absolutely, Your Honor.

6 **MR. GONZALEZ:** And, Your Honor, the last thing that  
7 you had asked, we have no objection -- our client has no  
8 objection to Mr. Cooper inspecting our device if the Court  
9 would deem that appropriate.

10 **THE COURT:** Well, fine.

11 **MR. VERHOEVEN:** Your Honor, on --

12 **THE COURT:** Wait.

13 But I let your in-house lawyer see their trade secrets  
14 over their objection. They get to see your product over your  
15 objection. It works both ways. I can see a legitimate need  
16 going both ways. I'm not ruling out Mr. Cooper for that role  
17 yet, but I'm saying it may work both ways.

18 **MR. GONZALEZ:** Understood. Thank you, Your Honor.

19 **MR. VERHOEVEN:** Your Honor, really quickly, on that  
20 subject, we're going back and forth on privileges. It looks  
21 like most of the relevant production is going to be claimed as  
22 privilege here.

23 Your Honor, one way to help us is to order an inspection  
24 of their product so under the protective order, our technical  
25 team and our technical expert could look at it next week, cut



1 through all of this tape, and see what they're doing so that we  
2 can adequately prepare our reply in time and on schedule,  
3 Your Honor.

4 If we use -- if we have to go through the process in order  
5 to get access to it to use a third-party special master, it's  
6 going to take time for that person to get up to speed on the  
7 technology.

8 **THE COURT:** Well, who is the exact person that you  
9 want to inspect their LiDAR system?

10 **MR. VERHOEVEN:** So Mr. Kintz -- has he been cleared?

11 **MR. JAFFE:** Yes.

12 **MR. VERHOEVEN:** -- has been cleared under the  
13 protective order procedure.

14 **THE COURT:** And so your proposal is just he and he  
15 alone would inspect the system?

16 **MR. VERHOEVEN:** He and Mr. Jordan, who has technical  
17 background, Your Honor.

18 **THE COURT:** Just those two?

19 **MR. JAFFE:** I think we would prefer some of our  
20 colleagues to come with us, but a small group.

21 **THE COURT:** No. No.

22 **MR. JAFFE:** If the Court says just me and Mr. Kintz,  
23 we will do that.

24 **THE COURT:** What's wrong with those two?

25 **MR. GONZALEZ:** So, Your Honor, as I said, if you want

1 to appoint somebody neutral, we have no objection to that.

2 **THE COURT:** No. The answer is no. I'm ordering what  
3 they want. By the end of next week, your expert and you, but  
4 nobody else, gets to go inspect their LiDAR system.

5 Mr. Gonzalez, it's fair.

6 **MR. VERHOEVEN:** Thank you, Your Honor.

7 **THE COURT:** 14,000 documents. This is the -- they've  
8 got a right to see if your client has stolen it and using it.  
9 This record warrants that. I'm going to order it.

10 **MR. VERHOEVEN:** Thank you, Your Honor.

11 **THE COURT:** All right. Thank you.

12 **MR. GONZALEZ:** Thank you, Your Honor.

13 (Proceedings adjourned at 10:47 a.m.)

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3                   CERTIFICATE OF REPORTER

4           I certify that the foregoing is a correct transcript  
5 from the record of proceedings in the above-entitled matter.  
6

7   DATE:   Thursday, April 6, 2017  
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12                   \_\_\_\_\_  
13           Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR  
14                   U.S. Court Reporter  
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